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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM TERRY LAWRENCE, Defendant and Appellant.	H026507 (Santa Clara County Super. Ct. No. EE223130)

By information filed on April 21, 2003, the Santa Clara County District Attorney charged appellant William Lawrence with one count of indecent exposure with a prior misdemeanor conviction for the same offense (Pen. Code, § 314, subd. (1), count one), and four counts of annoying or molesting a child under the age of 18 with a prior misdemeanor conviction for the same offense (Pen. Code, § 647.6, subd. (c)(l), counts two through five).[1] Appellant pleaded not guilty.

Jury trial began on August 14, 2003. On August 15, appellant waived his right to a trial on the prior conviction allegations, which comprised elements of the charged offenses, and admitted them. The presentation of evidence ended on August 18, 2003. The case went to the jury the afternoon of August 19, 2003.

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[1] Count two involved Nia; count three involved Carly; count four involved Caroline; and count five involved Carly. Nia was the person to whom appellant exposed himself in count one.

On August 22, 2003,[2] after requesting and receiving among other things read back of Nia's testimony, and all testimony related to the events of September 24, the jury returned a verdict. The jury deliberated for just under five hours. Appellant was found guilty of the count one indecent exposure charge (Pen. Code, § 314, subd.(1)), and the count two and count five charge of annoying or molesting a child under the age of 18 (Pen. Code, § 647.6, subd. (c)(l)). The jury found appellant not guilty on counts three and four.

On September 24, 2003, the trial court sentenced appellant to two years in prison on count one, plus a consecutive term of eight months (one-third the midterm; Pen. Code, § 1170.1) on count five. The court stayed a two-year term on count two pursuant to Penal Code, section 654.

Appellant filed a timely notice of appeal on September 24, 2003.

On appeal, appellant raises 10 issues. First, appellant contends that the trial court's denial of a *Miranda* motion was prejudicial error.[3] Second, statements that he made to an Officer McPhillips should have been excluded under Evidence Code section 352 because they were more prejudicial than probative. Third, the trial court had a sua sponte duty to instruct the jury with CALJIC No. 2.71 that appellant's statements to Officer McPhillips should be viewed with caution. Fourth, the trial court abused its discretion in admitting evidence of appellant's prior sex offenses under Evidence Code section 352. Fifth, the trial court abused its discretion by denying appellant's motion to reopen the case. Sixth, the court's refusal to reopen the case violated appellant's Sixth Amendment right to cross-examine and due process right to present a defense. Seventh, the trial court abused its discretion by denying appellant's motion for a new trial. Eighth, instructing the jury with CALJIC 2.50.01 violated appellant's due process right to a fair trial. Ninth, the

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2 Court was not in session on August 20 and 21.

3 *Miranda v. Arizona* (1966) 384 U.S. 436.

cumulative effect of the aforementioned errors requires reversal. Finally, Penal Code section 296 violates the Fourth Amendment's prohibition against unreasonable searches because it does not require individualized suspicion and this defect is not saved by the "special needs" search exception.

In two accompanying petitions for writ of habeas corpus, which this court ordered considered with the appeal, appellant, in propria persona, asserts a litany of errors including ineffective assistance of counsel, prosecutorial misconduct, error by the trial court in denying his motion for a new trial and failure of the Santa Clara County Sheriff's department to "assure [his] rights to Exculpatory Evidence." We have disposed of the habeas petitions by separate order filed this day. (See Cal. Rules of Court, rule 24(b)(4).)

After this case was fully briefed, the United States Supreme Court issued its opinion in *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*). In *Blakely*, the Supreme Court held that a state trial court's imposition of a sentence that exceeded the statutory maximum of the standard range for the charged offense based on additional factual findings made by the court violated the defendant's right to trial by jury. Appellant filed a supplemental brief in which he argues that imposition of consecutive sentences on the count one indecent exposure conviction (Pen. Code, § 314 subd. 1), and the count five conviction for annoying or molesting a child under 18 years of age (Pen. Code, § 647.6, subd. (c)(l)), deprived him of his right to a jury trial.

For the reasons outlined below, we affirm.

Statement of Facts

Count Five: Carly

On September 24, 2002, nine-year-old Carly went with her parents to Jo-Ann Fabrics in Cupertino. At some point while Carly wandered the store, she looked up and saw appellant. He was the only other person in her aisle. He was scratching at his genitals with both hands as he walked and looked at the Halloween toys. Carly felt scared and uncomfortable.

Subsequently, appellant asked Carly if she liked the toys. Carly answered "yes," and then walked away to return to her mother. Carly was upset, uncomfortable, and scared when she found her mother. Carly told her mother that a man had spoken with her and played with his private parts. Carly's mother, Renee B., testified that Carly, using words and body language, explained that the man was "pulling at" his "private parts" with an up-and-down motion.

Carly pointed out appellant to her mother and said he was the man. As Carly and Mrs. B left the store, Mrs. B. complained about appellant to a store employee.

Subsequently, Santa Clara County Deputy Sheriff Liza Aguirre spoke with Carly about what had occurred at the Jo-Ann Fabrics store on September 24. Essentially, Carly told Aguirre that appellant had been touching and scratching his "crotch area" in the store. According to Carly, as he did so, he looked at her.[4]

Counts One and Two: Nia

On October 12, 2002, nine-year-old Nia went to the Jo-Ann Fabrics store in Cupertino with her mother, Belinda S., to look for sewing patterns. The store was very crowded. Nia helped her mother by retrieving from cabinets the various patterns that her mother chose out of a sewing book. As Nia looked for a pattern in one of the aisles, she saw appellant in an aisle across from her. Appellant looked different from the other people in the store; his hair was so long that it was tucked into the back of his shirt and he was wearing a floppy hat. Appellant looked at Nia as he held a magazine over his face in

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[4] The prosecution evidence on counts three and four, of which appellant was acquitted, involved Carly and 9 year-old Caroline. On October 5, 2002, Carly went to the Jo-Ann Fabrics store again. This time she went with her mother, Renee B., and Caroline. While Caroline and Carly were together in one of the aisles, they saw appellant in a different aisle. He was approximately 20 to 25 feet away. Appellant was squeezing or scratching at and slapping his "privates" in a "back and forth" motion. The girls dubbed appellant the "Ping-Ping man." The girls pointed out appellant to Renee B. She noted that he was in the same place in the store as he had been on September 24.

one hand and used the other to touch, squeeze, and rub his penis. Seeing this and having him stare at her made Nia feel uncomfortable.

Later, after multiple trips back and forth to the pattern aisle, as Nia and appellant stood approximately eight and a half feet away from each other, Nia looked at him and saw his penis out of his pants. She watched him touch it with his hand and show it to her for a very short time. Nia described it as "skin color," round, and like "a hot dog." Nia did not think appellant was simply scratching himself because he did it for such a long time. According to Nia, at some point, appellant said something "about leaving, like am I leaving or something." During the time he had his penis out, he told her, " 'I hope you are not leaving any time soon.' "

Nia testified that she saw appellant rub his "privates" against a store cabinet, but she could not remember whether he did that before or after he removed it from his pants. After seeing appellant's penis, Nia went to her mother. Nia felt uncomfortable and scared. She did not like what appellant had done. Ms. S. noticed that Nia was upset and had a serious look on her face. Nia told her mother that she wanted to tell her something. Then, Nia told her mother that a "man had showed his privates to her." Ms. S. walked around the store with Nia and had Nia point out the man. Nia identified appellant without hesitation. Ms. S. yelled at appellant and called the police. Officers arrived in about 20 minutes and arrested appellant. Deputy Aguirre spoke with Nia. Nia told Aguirre about seeing appellant rubbing his crotch in an aisle of the store. Nia "stated that -- it looked like he was scratching, but she said . . . she knew he was not." Nia told Aguirre that a smiling appellant had told her at that point "'I hope you're not leaving any time soon. I don't want you to leave." Nia told Aguirre that when she saw appellant in the aisle later, appellant pulled his penis out of his pants and showed it to her.

Barbara Feeney, a cashier at the Cupertino Jo-Ann Fabrics store, testified that appellant began frequenting the store sometime in September 2002. In the approximately 30 to 45 days leading up to October 12, 2002, appellant came to Jo-Ann Fabrics "almost

every day" and would occasionally buy little things like candy. He never purchased fabric or thread. He would stay at the store most of the day.

Prior Offense Evidence

Danielle

On June 17, 1996, when she was 11 years old, Danielle E. went to Twin Lakes in Santa Cruz with her mother and younger sister Jessica, for a picnic. Shortly after they arrived, appellant pulled up in a truck and parked behind the family's car. Appellant was friendly and helped Danielle's mother do "whatnot." Danielle and her family gathered their things and walked from the parking lot to the beach below. Appellant stayed in the parking lot. Later, as Danielle got out of the water after swimming, she saw appellant. He was standing by his truck, waving or gesturing for her to come to him. Danielle was confused as to who appellant was waving at, so she ignored him.

Still later, Danielle walked to her family's vehicle to load up some of their belongings while the rest of the family stayed on the beach. Danielle turned around after putting the items in her vehicle. That is when appellant "flashed" her from about four or five feet away. Specifically, Danielle explained that appellant had his hands in his pockets and she saw his penis come out from the bottom of one of the legs of his shorts when he pulled his jacket back. Danielle felt quite embarrassed and ashamed. She turned around and walked back to the beach.

As Danielle and her family were leaving, Danielle told Jessica what appellant had done. Against Danielle's wishes, Jessica immediately told their mother. Their mother then filed a police report.

Esmeralda

During the 1996-97 school year, when 14-year-old Esmeralda was in the 8th grade, she was a volunteer at a branch of the Santa Cruz County Library. Appellant frequented the same library. On certain occasions, sometimes alone, and sometimes with other kids, Esmeralda worked at the same table as appellant. On at least two of those

occasions, appellant wrote notes on the library computer, printed them out, and passed them to Esmeralda by scooting them across the table. The notes read: "Do you want to have dinner?" and "You look pretty"; "do you want to have sex?" As appellant put the notes on the table he looked at Esmeralda and smiled. Appellant passed more than five notes to Esmeralda. He never passed any notes to Esmeralda when there was an adult sitting at the table, nor did her ever try to talk to her.

At first Esmeralda simply ignored the notes and never even picked them up. Later, she told the person in charge of the library about them. After that, she never saw appellant at the library again.

Appellant suffered a misdemeanor conviction for annoying or molesting a child in 1996 (Pen. Code, § 647, subd. (a)), and a misdemeanor conviction in 1995 for indecent exposure (Pen. Code, § 314.1).

Nothing in the evidence presented to the jury indicated whether these convictions related to the acts against Danielle and Esmeralda.

State Of Mind Evidence

Santa Cruz Police Officer Sergeant Jack McPhillips testified that in February 1997, while investigating an incident that had occurred the day before at a local strip mall, he contacted appellant at a coffee shop at that mall and had appellant step outside so that they could talk about the incident. A nervous and fidgety appellant told the sergeant that he (appellant) was in counseling for sexual problems and that he saw a counselor once a week. Appellant admitted that he still felt urges when it came to young children, and that he had to consciously stay away from young kids because of his problem. Appellant also told the officer that he was on probation. McPhillips opined that although appellant did not state what his sexual problems concerned, or what his urges were, "[i]n the context of our conversation" appellant "was [saying] that he had sexual problems with young children and that's what the urges were." McPhillips did not arrest appellant and allowed him to leave the scene.

During cross examination, defense counsel questioned McPhillips and established that appellant never said what his sexual problems were or what his urges were.

The Defense Case

The defense presented evidence that appellant suffered from herpes, which causes itchiness just before an outbreak. From this evidence, defense counsel argued that appellant was scratching that itch in Jo-Ann Fabrics, not removing his penis or otherwise engaging in sexual misbehavior.

Dr. Joseph Marzouk, a specialist in the area of infectious diseases and an expert in the field of the treatment, symptoms, and diagnosis of the herpes virus, made clear that herpes is an infection that "loves the nerve endings. So it loves the nerves, the sensory nerves, or what we feel actually." Dr. Marzouk explained that the first outbreak of the virus is generally the worst attack, after which the virus resides in the nerves in the spinal column and stays there for the duration of the person's life. In some people, the virus and resulting herpes lesions (blisters to scabs) periodically recur.

These recurrences can be brought on by emotional stress, sunlight, or another infection. Some herpes sufferers experience "prodromes," that is, a feeling of "itchiness and numbness" 24 hours before the outbreak and appearance of their lesions. Once a lesion appears it has the same symptoms of itchiness and irritation.

After reviewing appellant's medical records Dr. Marzouk opined that "most likely" appellant had "a history of recurrent genital herpes, or herpes that keeps coming back." Appellant's medical records showed three documented recurrences of lesions on his penis: in 1984, in April 2003, and in June 2003. Appellant's records showed that at the time of his arrest on October 12, 2002, he complained of having genital herpes, but the records did not indicate whether appellant was examined at that time or simply self-reported the herpes. The word "rash" was circled on the October 12 record.

Dr. Marzouk admitted that he had insufficient information to conclude appellant was suffering from "prodrome" on September 24, October 5, or October 12, 2002. Dr.

Marzouk opined, however, that the conclusion that appellant was, in fact, suffering from an actual herpes outbreak on October 12 was consistent with actual observations made in the rest of appellant's records and with his medical history. The doctor had insufficient information, however, to declare that definitively.

Discussion

Miranda

During the prosecution's case in chief, in an effort to prove appellant's state of mind when committing the charged offenses, the prosecutor presented the testimony of Santa Cruz Police Officer Jack McPhillips. Before trial, defense counsel sought to suppress appellant's statements to McPhillips. Counsel argued that appellant's statements were taken in violation of his *Miranda* rights.

Judge Zecher denied appellant's motion to suppress. She declared that she "believ[ed]the officer." Furthermore, she noted "Mr. Lawrence said that no one put any hands on him. He was free to go. There were no handcuffs. And so I feel there was no *Miranda* required. So those statements can come in."

Appellant renews his claim on appeal that the statements were taken in violation of his *Miranda* rights.

At the suppression hearing, McPhillips testified that on February 24, 1997, he learned from a Community Service Officer appellant had approached a 12 year-old girl at the Top Aquarium in Del Mar Shopping Center. Appellant had brushed against her, followed her around and made her feel uncomfortable. Furthermore, he learned that appellant frequented the aquarium and talked with children.

McPhillips checked appellant's criminal history and discovered that appellant was required to register as a sex offender (Pen. Code, § 290), that he was on probation and he had been arrested for child molestation (Pen. Code, § 288) and for indecent exposure (Pen. Code, § 314).

McPhillips went to the aquarium and spoke with the manager. The manager told McPhillips that he had "kicked [appellant] out" of the aquarium after hearing that appellant had inappropriate contact with a girl.

McPhillips, dressed in plainclothes, went to a shopping center that he knew appellant frequented. He intended to investigate the aquarium incident and appellant "in general." In part, McPhillips wanted to speak with appellant because he was a registered sex offender and had been arrested for child molestation. At the West Side Coffee Shop, the manager pointed out appellant to McPhillips. In addition, the manager complained to McPhillips that appellant had sexual conversations with her and with her employees. McPhillips approached appellant and identified himself as a detective. McPhillips radioed dispatch and told them he would "be out with a subject."

McPhillips "instructed" appellant to go outside so that he could talk about what was going on. McPhillips and appellant left the coffee shop and walked approximately 100 yards down an alley and breezeway to a "place for privacy" not frequented by the public. At that point, Officer Howe arrived. He was dressed in full police uniform including a weapon.

McPhillips asked appellant "open-ended" questions about what happened at the aquarium. Appellant told McPhillips about how he followed a girl into the store and then tried to talk to her father about resolving the situation. When McPhillips told appellant that he knew he was on probation and that he knew that he had to register, appellant became nervous and fidgety. Appellant told McPhillips about his "urges," and that he was still in counseling for sexual problems. He was not specific about what his urges were, only that they were with young children.

Appellant and the officers spoke for less than 10 minutes, during which time appellant was not handcuffed or restrained. According to McPhillips appellant was free to leave. At the end of the interview, McPhillips told appellant that he was free to go.

McPhillips did not arrest appellant because he believed that he did not have probable cause so to do.

Appellant testified at the suppression hearing that on the day in question McPhillips and a uniformed officer approached him. McPhillips told appellant "to come with him" like it was a command. Appellant went with him because he felt as if he "was being apprehended." Appellant testified that the officers used a "pretty authoritarian tone of voice." He felt as if he had no choice but to go with the officers and that he could not turn around and walk away.

As noted, the trial court denied appellant's motion to suppress the statements he made to McPhillips.

A person must be advised of his or her rights under *Miranda* when subjected to "custodial interrogation." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 444; *People v. Mickey* (1991) 54 Cal.3d 612, 648 (*Mickey*).) In this context, "custodial" means any situation in which " 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.]" (*Mickey*, *supra*, at p. 648.) The test is whether a reasonable person in the defendant's position would feel that he or she was in custody -- that is, whether in light of all the circumstances of the interrogation, there was a " ' "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.]" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fns. omitted.)

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and

second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry . . . is distinctly factual . . . . The second inquiry, however, calls for application of the controlling legal standard to historical facts. This ultimate determination . . . presents a "mixed question of law and fact" . . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusion regarding ' "basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .' " ' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Thus, in reviewing the trial court's ruling, "we accept [its] factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence." (*People v. Mayfield* (1997) 14 Cal.4th 668, 733.)

In *People v. Aguilera* (1996) 51 Cal.App.4th 1151, we identified some of the circumstances relevant to an inquiry into whether there has been a custodial interrogation. "Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the

person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]" (*Id*. at p. 1162.)

As we noted, "[n]o one factor is dispositive. Rather we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest. [Citation.]" (*Ibid*.)

Applying the factors here, we agree with the trial court that there was no custodial interrogation. Appellant and McPhillips left the coffee shop and walked into an open area, albeit away from the public. McPhillips did not handcuff appellant, or restrain him in any other way. Furthermore, McPhillips asked open-ended questions that were not aggressive, confrontational, or accusatory. McPhillips did not mention to appellant that he knew he was on probation and was required to register as a sex offender until after appellant answered questions about the aquarium incident. The interview was of limited duration, lasting less than 10 minutes and appellant was not arrested at the end of the interview. Appellant was told that he was free to go.

The forgoing circumstances did not create "a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera*, *supra*, 51 Cal.App.4th at p. 1162.) Accordingly, we conclude that the trial court did not err in denying appellant's motion to suppress his statements to McPhillips.

Since we have concluded that the trial court did not err in denying appellant's motion to suppress, we need not address the issue of prejudice.

Evidence Code Section 352

In addition to arguing that the trial court should suppress appellant's statements to McPhillips on *Miranda* grounds, defense counsel filed an in limine motion in which he argued that Evidence Code section 352 compelled the exclusion of the statements. Specifically, defense counsel argued that the statements were vague and ambiguous. The evidence was remote and cumulative, time consuming in that it would require a *Miranda* hearing, and would confuse the jury.

Appellant contends that the trial court never ruled on this objection and defense counsel did not press the court for a ruling. Accordingly, defense counsel's failure constituted ineffective assistance of counsel.

The Attorney General points out that the portion of the record to which appellant cites as showing defense counsel's failure to press for a ruling on his Evidence Code section 352 motion "shows no such thing. Indeed, it shows that the trial court sustained counsel's 352 objection to the proffered testimony by McPhillips." We find no such ruling in the record.

Section 352 of the Evidence Code provides in pertinent part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice . . . ."

When a section 352 objection is raised, "the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value." (*People v. Green* (1980) 27 Cal.3d 1, 25, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826.) Thus, the fact that appellant's statements to McPhillips were not obtained in violation of *Miranda*, does not of itself render the evidence admissible when a section 352 objection has been raised. (*Id.* at p. 26.)

Here defense counsel explicitly argued, in his written in limine motion, that "[t]he statements are vague and ambiguous, the evidence is remote, cumulative, will be

extremely time consuming, will require a hearing on the *Miranda* issue, will be very confusing to the jury and any slight probative value they may have in these proceedings is outweighed by the prejudicial effect it will have . . . ." Thus, the issue was before the court. In its ruling admitting appellant's statements to McPhillips, there is no indication that the court had in fact weighed the probative value of the evidence against its prejudicial effect.

Accordingly, we address appellant's contention that trial counsel was ineffective in failing to press the court for a ruling.

The standard for incompetence of counsel is well established. " '[A] defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 274.)

Appellant asserts that had defense counsel pressed for a ruling on his objection it would have been sustained. We disagree.

Evidence Code section 352 gives trial courts discretion to exclude otherwise relevant evidence when the probative value of that evidence is "substantially outweighed" by the probability that admission "will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury."

Here, as the prosecutor argued the evidence had probative value. It constituted circumstantial evidence of an abnormal sexual interest in children.[5] Furthermore, the statements were circumstantial evidence that when appellant exposed himself to Nia, he

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[5] In order to prove a violation of Penal Code section 647.6, subdivision (c)(1), the prosecution was required to show that appellant was "motivated by an unnatural and abnormal sexual interest" in the child victims. (CALJIC No. 10.57, *People v. Lopez* (1998) 19 Cal.4th 282, 289.)

did so with the specific intent to direct public attention to himself for his own sexual arousal or gratification. (CALJIC No. 10.38.)

Moreover, as to the prejudice referred to in Evidence Code section 352, it "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

Appellant argues that his statements presented to the jury a "picture" of him "as a pedophile who 'consciously had to stay away from young [children] because of his problem.' " Appellant points out the prosecutor used the statements to label him "a pedophile" and "a molester." Accordingly, he argues defense counsel's failure to press for a ruling under these circumstances was unquestionably deficient.

Assuming, without deciding that it was error on 352 grounds for the trial court to admit appellant's statements to McPhillips, we find the error harmless. A defendant is prejudiced from state law error where there exists a reasonable probability that, absent the error, the defendant would have received a more favorable verdict. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

Apart from appellant's statements to McPhillips, there was substantial evidence to prove that appellant's acts towards his current victims had a sexual intent and were motivated by an abnormal sexual interest in children. Appellant exposed himself to Danielle and wrote sexual notes to Esmeralda. (See *People v. McFarland* (2000) 78 Cal.App.4th 489, 494, [competent evidence of prior offenses admissible to show that defendant had the requisite mental state].)

Accordingly, we conclude that any error was harmless.

CALJIC No. 2.71

Appellant contends that the trial court erred in failing to instruct sua sponte with CALJIC No. 2.71.

CALJIC No. 2.71 states: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

"When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution. [Citation.]" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) " '[T]he purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' " (*Ibid*.)

Appellant did not contest that the statements were made; rather defense counsel suggested during cross-examination that appellant was admitting to unidentified sexual problems and unidentified urges towards children. Furthermore, during closing argument, defense counsel argued to the jury that appellant's statements to McPhillips were ambiguious. Specifically, defense counsel pointed out to the jury that appellant spoke "about sexual problems. We don't know what they were. That he felt insecure. That he couldn't have sex. We don't know. He never explained anything further regarding urges toward children, what they were at that time."

Since another purpose of the cautionary instruction is to help the jury determine what the statement meant (*People v. Beagle* (1972) 6 Cal.3d 441, 456), we conclude that the trial court erred in failing sua sponte to give CALJIC No. 2.71.

The omission does not constitute reversible error if there exists no reasonable probability the jury would have reached a more favorable verdict had the court given the instruction. (*People* v. *Watson, supra,* 46 Cal.2d 818, 836.)

Here, there was no dispute that appellant made some statements. The dispute was over the meaning of the statements. The jury was instructed pursuant to CALJIC No. 2.27 that they should carefully review all the evidence upon which the proof of a fact depends. Furthermore, pursuant to CALJIC No. 2.81, the jury was instructed that they were not required to accept an opinion, but should give it the weight if any to which they found it was entitled.

Thus, the jury was given guidance on how to view McPhillips's testimony and credit it with the meaning that the prosecutor argued it should have. Consequently, essentially, the jury received the same message that it would have received if CALJIC No. 2.71 had been given. Accordingly, we conclude that it is not reasonably probable appellant would have received a more favorable result had the court given the instruction.

Prior Sex Offenses

Appellant contends that the trial court abused its discretion by admitting evidence of his prior sexual offenses.

Pursuant to Evidence Code section 1101, subdivision (b), and section 1108, the prosecutor sought to introduce evidence of appellant's prior sexual misconduct involving Danielle and Esmeralda to show that appellant had a propensity for engaging in sexual misconduct with young children. Over appellant's objection, the trial court granted the request.

The trial court determined that the evidence was more probative than prejudicial. In particular, the court noted that the acts were "not remote." Further, they were similar "in that there are children involved and the annoyance of children." Finally, the acts were "no more inflammatory than the current charges, and it's just more probative than prejudicial." Accordingly, the court ruled, "under 352 those acts come in."

In a case where the defendant is charged with a sex offense, Evidence Code section 1108 permits the prosecution to introduce "evidence of the defendant's commission of another sexual offense or offenses . . . , if the evidence is not inadmissible

pursuant to Section 352." Evidence Code section 1108 "was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a) imposed" upon the prosecution's ability to introduce evidence to prove the defendant's conduct on a specified occasion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) The statute "implicitly abrogate[d]" prior California Supreme Court decisions holding that admission of propensity evidence was unduly prejudicial to the defense. (*Ibid*.)

We will disturb a trial court's exercise of discretion under section 352 only if the court's decision exceeds "the bounds of reason." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

A number of factors must be considered in determining the probative value of uncharged crimes evidence. These include: (1) the tendency of that evidence to prove that which the prosecution offered it to prove; (2) the extent to which the source of that evidence is independent of the evidence of the charged offense; and (3) the proximity in time of the uncharged offense to the charged offense. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.) Factors to consider in determining the prejudicial impact of other crimes evidence include: (1) whether the uncharged offense resulted in a criminal conviction; and (2) the inflammatory nature of the uncharged offense compared with that of the charged offense. (*Id*. at p. 405.)

The probative value of the uncharged incidents was their tendency to prove that appellant had a propensity for sexual misconduct against little girls.[6] Moreover, the evidence had a tendency to prove that appellant had a sexual intent when committing the charged acts.

The source of the uncharged acts was separate from the charged offenses. Neither Danielle nor Esmeralda was a current victim. Furthermore, the prior acts occurred six to

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[6] In fact, the acts against Danielle did result in a conviction. However, the jury was not aware of this fact.

eight years before the current crime. Therefore, they were not too remote. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395, [20 year-old prior not too remote].)

On the side of prejudice, the jury did not learn that appellant was convicted for any offense stemming from the uncharged acts. The jury did learn, from a stipulation, that appellant had one conviction for annoying or molesting a child and one conviction for indecent exposure. The prosecutor informed the jury, pursuant to the stipulation, that these events occurred on or about June 18, 1996, and March 16, 1995, respectively.

Here, however, where the uncharged incidents were "no stronger and no more inflammatory than the testimony concerning the charged offenses," the "potential for prejudice" was decreased. It was "unlikely" the jury would have disbelieved the victim's testimony but nonetheless have convicted appellant because of the other offenses or that the jury's passions would have been "inflamed" by the prior acts. (*People v. Ewoldt*, *supra,* 7 Cal.4th at p. 405.)

In balancing these factors, we conclude that the probative value of the evidence of appellant's uncharged acts outweighed its prejudicial effect. Accordingly, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Denial of Defense Motion to Reopen

Appellant contends that the trial court abused its discretion in denying the defense request to reopen their case.

On the sixth day of appellant's jury trial, the prosecution called Barbara Feeney.[7] As noted, Ms. Feeney testified that appellant came to the Jo-Ann Fabrics store almost every day during the week and on weekends, for a month an a half and was "there for most of the day," from 10 a.m. to 6 or 7 p.m.

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[7] The prosecution called Ms. Feeney after Dr. Marzouk testified out of order.

Following Ms. Feeney's testimony, the prosecution called one more witness and then rested its case. At defense counsel's request, the court took a short recess. After the recess, the defense rested and the prosecutor argued.

During his summation, the prosecutor argued that the fact that appellant spent so much time in the Jo-Ann Fabrics store showed that he was a predator. Immediately following the prosecution's summation, defense counsel began his closing summation. The trial court interrupted defense counsel's argument when it ordered a recess for the day at 4:28 p.m.

The next morning, Tuesday, August 19, defense counsel resumed and finished his summation. Then, the prosecutor gave his rebuttal summation, the court instructed the jury, and the jury retired to deliberate. Except for a 15-minute break, the jury deliberated continuously from 1:45 p.m. until 4:30 p.m. when the court ordered a recess for the day. The court ordered the jury to return on Friday, August 22 to resume deliberations.

When the court reconvened on Friday, August 22, defense counsel was present during a requested read back of testimony. Subsequently, when defense counsel returned to his office he found a fax detailing appellant's employment at Berger Manufacturing from September 1, 2002, to October 13, 2002. Defense counsel returned to court with a request to put something on the record, but the court was busy with a jury from another case.

At 2 p.m. on August 22, defense counsel returned to court and moved to reopen the defense case to introduce appellant's work records and impeach Ms. Feeney's testimony. Defense counsel indicated that the evidence would show that appellant "could not have been at the store as a predator as claimed, at least on this basis as Ms. Feeney testified to."

Defense counsel stated that he was unaware that Ms. Feeney would testify that appellant was at the store on a daily basis, because these facts were not included in the discovery he had received, neither had the prosecutor told him that Ms. Feeney would

testify as she did. Defense counsel asserted that the prosecutor had indicated to him that he was not aware that Ms. Feeney would testify regarding the frequency that appellant was at the store.

Defense counsel stated that following closing argument he was away for two days and that this "case stopped." Defense counsel informed the court that two Berger employees would authenticate the records. Defense counsel had attempted to subpoena the witnesses, but had been unsuccessful because his investigator arrived after the business closed. Defense counsel was prepared to call both witnesses on the following Monday. Defense counsel stated that the witnesses were prepared to testify that appellant's work hours were from 6:30 a.m. to 3:30 p.m. on Monday through Thursday and 6:30 a.m. to 12.30 p.m. on Fridays.

Defense counsel argued that the introduction of the evidence would not take much time. Again, he argued that the records were important because they went "to some issue that Ms. Feeney has testified and which the prosecutor argued showed my client is some kind of a predator."

The prosecutor responded that before she testified Ms. Feeney had told him only that "all the defendant would buy from the store was candy, and that's it. So we didn't discuss the dates and how long he had been there." The prosecutor thought it "very suspicious" that appellant only mentioned his employment after the jury had begun deliberations, instead of when Ms. Feeney testified as she did. The prosecutor said that if it was "anyone's fault, it's Mr. Lawrence's fault."

Defense counsel responded that he had brought the new evidence to the court's attention "as fast as [he] learned of it." When the court asked why appellant had not told him at the time he was cross-examining Ms. Feeney, defense counsel explained that appellant did pull him by the sleeve and told him that he was at work, but because he was cross-examining Ms. Feeney he "may not have taken notice of him." The court asked counsel if he had heard what appellant had said. Defense counsel replied that he had not.

The court asked defense counsel if it was his client's word as to what had happened. Defense counsel responded, "I am not saying he didn't pull my sleeve. He may very well have. In fact, it happens every now and then. And when that does happen, a lot of the time I don't want to be interrupted, and so I will just say wait, or something, and continue questioning the witness."

The prosecutor told the court that if it permitted the introduction of the work records, he would recall Ms. Feeney to "explain any discrepancy." Furthermore, he would seek to present testimony of another store employee who, he claimed, would testify that appellant "was coming [to the store] constantly for two to three weeks leading up to his arrest."

The trial court addressed defense counsel noting that appellant was very "vociferous. He talked several times out of turn, as far as I am concerned. So I think that, you know, he could have said something to you, and you would have heard it; right?" Defense counsel responded, "Well, he apparently did say something to me." The court questioned defense counsel, "But you didn't hear it. So I don't know if he said it or not." The court commented that appellant could have brought the issue of his employment to counsel's attention during recess and in certain in camera hearings.

Defense counsel noted that he had appellant's bank records, as well as fitness club records showing that appellant was in Southern California on September 18, October 7, and October 10, 2002. That is, days when he was not at work. Defense counsel stated that while these records "might have shown" that appellant was not in the store every day as claimed by Ms. Feeney, they related to only a few days at most. In comparison, appellant's work records showed that Ms. Feeney was wrong about appellant's presence at the store for the entire month of September.

The court denied appellant's motion to reopen. The court found that there was no due diligence. In addressing defense counsel the court stated, "You did have these

records in your hand. You could have cross-examined on that. . . . [¶] . . . I just think that it's just late."

"We review for abuse of discretion a trial court's ruling on a motion to reopen a criminal case to permit the introduction of additional evidence. [Citations.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) Factors we consider in reviewing the trial court's determination include the stage the proceedings had reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect the jury would accord it undue emphasis, and the significance of the evidence. (*Ibid*.)

Assuming arguendo that the trial court erred in refusing the request to reopen, we do not think it is likely that there would have been a different outcome in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d 818.)

Appellant did not dispute that he was in Jo-Ann Fabrics on October 12 (the day alleged in count one and two). Furthermore, the new evidence established only that appellant worked for 8.5 hours on September 24 (the day alleged in count five). Thus, he could have been in Jo-Ann Fabrics after he finished work.

As the Attorney General concedes, the new evidence could have "taken some sting" out of the prosecution's argument that Ms. Feeney's testimony showed that appellant was engaged in "predatory behavior." However, given the evidence of appellant's prior acts against Danielle and Esmeralda, it is unlikely that the jury was unaware of appellant's predatory tendencies.

Consequently, we conclude that it is not reasonably probable the jury would have acquitted appellant of counts one, two and five had it heard the evidence concerning appellant's work records.

Sixth Amendment Violation

Appellant contends that the court's refusal to allow him to impeach Ms. Feeney with his work records violates his Sixth Amendment right to cross-examine and his due process right to present a defense. Accordingly, on this basis, he contends that the

appropriate harmless error standard of review is whether the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18.)

In *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*), the trial court excluded all evidence regarding the circumstances of the defendant's confession where the validity of his confession was the "central" issue in the case. (*Id*. at p. 690.) The U.S. Supreme Court found that the error violated the defendant's constitutional rights, but it did not evaluate the prejudicial nature of the error. The Supreme Court indicated, however, that the appropriate standard of review would be whether the error had been harmless beyond a reasonable doubt. (*Id.* at p. 691.)

In *Washington v. Texas* (1967) 388 U.S. 14 (*Washington*), a murder case in which the court found that the defendant had been denied his Sixth Amendment right to present witnesses on his behalf, the trial court had excluded testimony by the defendant's alleged accomplice that the accomplice had committed the murder over the defendant's protest. (*Id*. at pp. 15-17.) The U.S. Supreme Court reversed, but it made no mention of harmless error review.

In *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), the trial court excluded evidence that a third party had repeatedly confessed to the murder with which the defendant was charged, and the court refused to allow cross-examination of the third party at trial by the defendant. (*Id.* at pp. 287-289, 295.) The U.S. Supreme Court concluded that the defendant had been denied a fair trial and reversed. However, it strictly limited its decision to the facts of the case before it. (*Id.* at pp. 302-303.)

The Attorney General relies on an excerpt from the California Supreme Court's decision in *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 (*Fudge*) to argue that what occurred in this case was a proper rejection of some evidence concerning the defense and not a refusal to allow appellant to present a defense. In *Fudge*, the California Supreme Court stated: "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.]

Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' " (*Id*. at pp. 1102-1103.)

Strictly speaking, the trial court rulings in *Chambers* and *Washington*, like the ruling in *Fudge*, excluded some defense evidence. The trial courts excluded certain testimony by certain witnesses or they excluded certain witnesses from testifying at all, but the trial courts did not preclude the presentation of other evidence pertinent to the defense. Hence, it would appear that the determination as to whether a particular trial court action excluding "some" defense evidence amounts to a denial of due process must be determined on an ad-hoc case-by-case basis rather than by reference to some bright-line rule.

Here, we are convinced that the trial court's ruling in denying appellant's motion to reopen was not a denial of due process under the federal Constitution. The central issue in the case was not that appellant was not the person identified by the children in the store. Rather, the central issue was what appellant was doing: scratching an itch because his herpes had recurred, or playing with and exposing his private parts for sexual purposes.

As noted, the value of the new evidence was that it might have "taken some sting" out of the prosecution's argument that Ms. Feeney's testimony showed that appellant was engaged in "predatory behavior." In no way did it prevent appellant from presenting his defense that he was suffering from recurring bouts of herpes on the days when the victims saw him touching his private parts.

Accordingly, we conclude that the trial court's denial of appellant's motion to reopen did not amount to a due process violation.

New Trial Motion

Appellant contends that the trial court abused its discretion by denying his motion for a new trial.

Following his conviction, appellant made a motion for a new trial. He asserted that he was entitled to a new trial because the trial court had erred under the law. He noted six different errors by the trial court. First, he asserted that the trial court erred in denying his motion to reopen. Second, the trial court erred in permitting the evidence of his prior sexual behavior towards Danielle and Esmeralda. Third, the trial court erred in permitting the evidence of his prior convictions. Fourth, the trial court erred in permitting the evidence from Nia's mother and Carly's mother about what their daughters had told them. Fifth, the trial court erred in denying his *Miranda* and Evidence Code section 352 motions to exclude evidence of his statements to McPhillips. Finally, the trial court erred in excluding evidence that he told the arresting officer that he had herpes.

The trial court denied the motion stating, "[w]ell as far as I'm concerned, we have litigated these issues, and there is nothing new in your motion for a new trial. So the motion is denied."

Appellant claims that the ruling was an abuse of discretion, but only as to the McPhillips and reopening issues.

Whether or not a motion for a new trial should be granted is within the discretion of the trial court. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) " ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citations.]" (*Ibid*.)

Penal Code section 1181 provides that when a verdict has been rendered against the defendant, he or she may move for a new trial in limited circumstances. One of the grounds upon which a defendant may base a motion for a new trial is "[w]hen the court

. . . has erred in the decision of any question of law arising during the course of the trial . . . ." (Pen. Code, § 1181, subd. (5).)

A trial court may grant a motion for a new trial on the ground that it has erred in a decision of any question of law, but only if the defendant can demonstrate the existence of a reversible error. (*People v. Clair* (1992) 2 Cal.4th 629, 667.)

As noted, the trial court did not err in permitting the introduction of appellant's statements to McPhillips. Accordingly, the trial court did not abuse its discretion in denying appellant's motion for a new trial on the ground that the court had erred in admitting that evidence.

Similarly, as noted, the trial court did not prejudicially err in denying the defense motion to reopen the case during jury deliberations. Since defendant cannot demonstrate prejudice from the trial court's denial of his motion to reopen the case, we cannot say that the trial court ruled unreasonably in denying his motion to reopen. Accordingly, we conclude that the trial court did not abuse its discretion in denying appellant's motion for a new trial.

CALJIC No. 2.50.01

Appellant contends that instructing the jury that it could infer that appellant had a disposition to commit sexual crimes if it found he committed prior sexual offenses violated his due process right to a fair trial.

The trial court instructed the jury pursuant to CALJIC No 2.50.01 as follows: "If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime for which -- crime or crimes for which he -- for which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an

inference properly can be drawn from this evidence, this inference is simply one for you to consider along with all the other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

Appellant acknowledges that this court is bound by the California Supreme Court's decision in *People v. Falsetta*, *supra*, 21 Cal.4th 903, in which the court held that CALJIC No. 2.50.1 does not violate due process. Appellant is correct, we are bound by the Supreme Court's decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Accordingly, we reject appellant's due process challenge.

Cumulative Error

Appellant asserts that all the preceding assignment of errors even if insufficient to compel relief when viewed in isolation, require reversal of the judgment when considered in combination. As we have explained above, what few errors occurred in this case were harmless. Finding no prejudice to appellant, there can be no cumulative error requiring a reversal of the judgment. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1245.)

Penal Code Section 296

At sentencing, without objection from appellant, the trial court ordered him to provide two blood samples and one saliva sample pursuant to Penal Code section 296. Appellant contends that we must reverse the Penal Code section 296 order. He asserts that Penal Code section 296 "violates the Fourth Amendment's prohibition against unreasonable searches because it does not require individualized suspicion and this defect is not saved by the 'special needs' search exception."

Penal Code section 296, subdivision (a)(1) ("section 296") provides, in pertinent part, that "[a]ny person who is convicted of any of the following crimes [including any

offense or attempt to commit any felony offense described in Section 290],[8] . . . shall, regardless of sentence imposed or disposition rendered, be required to provide two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand for law enforcement identification analysis."

Essentially, appellant asserts that a search such as the one required by Penal Code section 296 passes constitutional muster only if it falls within the "special needs" exception recognized in United States Supreme Court cases such as *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602 (*Skinner*). In *Skinner*, the Supreme Court held that when "special needs" beyond the normal need for law enforcement are present, the court "balance[s] the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." (*Id*. at p. 619 [it is reasonable to conduct alcohol and drug testing of railroad employees, without a warrant or reasonable suspicion, due to overriding public safety concerns].)

Appellant claims that because the purpose of section 296 is for "general law enforcement purposes," it does not meet the "special needs" exception to the Fourth Amendment's requirement of individualized suspicion to justify a search.

Appellant acknowledges that this court recently rejected a similar challenge to section 296 in *People v. Adams* (2004) 115 Cal.App.4th 243 (*Adams*). Furthermore, he acknowledges that other courts have rejected similar claims. (See, e.g., *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 (*Alfaro*) [noting consistent rejection of similar challenges by courts in other jurisdictions], *People v. King* (2000) 82 Cal.App.4th 1363, 1370 (*King*) [noting defendant's failure to cite any case against providing blood samples pursuant to section 296].) Appellant asserts that these cases are wrong.

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[8] Both of appellant's offenses are included in Penal Code section 290, subdivision (a)(2)(A).

In *Adam*s, we followed *Alfaro* and *King*, concluding that section 296 served a compelling governmental interest that outweighed the diminished expectation of privacy of a person convicted of one of the enumerated crimes. (*Adams*, *supra*, 115 Cal.App.4th at pp. 257-258.) We rejected the assertion that "special needs" beyond the normal law enforcement need must be identified for an exception to the individualized suspicion requirement. (*Id*. at p. 258.) We distinguished two United States Supreme Court cases *Indianapolis v. Edmond* (2000) 531 U.S. 32 and *Ferguson v. Charleston* (2001) 532 U.S. 67, which involved searches of the general public rather than searches of convicted felons, who "do not enjoy the same expectation of privacy that non-convicts do." (*Ibid*.)

Appellant cites to the recently decided United States Supreme Court case of *Illinois v. Lidster* (2004) 540 U.S. 419 [124 S.Ct. 885] (*Lidster*), to support his position that section 296 is unconstitutional. In *Lidster*, police officers stopped the defendant at a highway checkpoint set up to obtain information about a recent hit-and-run accident in the vicinity. The police arrested the defendant at the checkpoint for driving under the influence of alcohol. Later, he was tried and convicted. The defendant appealed on the ground that the checkpoint violated his Fourth Amendment rights. (*Lidster*, *supra*, 540 U.S. at p. __ [124 S.Ct. at p. 888].)

The *Lidster* court applied a balancing test, examining " 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' [Citations.]" (*Lidster*, *supra*, 540 U.S. at p. __ [124 S.Ct. at p. 890].) The court noted that the purpose of the checkpoint stop was to seek help in finding the perpetrator of a specific crime, that the police had tailored the stops properly with respect to time and place to fit their investigation, and that the brief stops interfered only minimally with the public's Fourth Amendment rights. (*Id*. at p. 891.) In light of these factors, the court held that the checkpoint stop was reasonable and thus constitutional. (*Ibid*.)

Appellant asserts that *Lidster* is "helpful simply for its discussion of the decision in *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, and the limits on searches without individualized suspicion which that case sets forth."

Appellant contends that the *Lidster* court "implicitedly [*sic*] reaffirmed the principle that where the police conduct a search whose primary purpose is to determine whether the person searched committed a crime, they must have individualized suspicion."

Lidster adds nothing to the analysis articulated in *Indianapolis v. Edmond, supra,* 531 U.S. 32. It merely reasserts that when the primary law enforcement purpose for seizure is *not* to determine whether the occupants of a vehicle are committing a crime, the reasonableness of the seizure is determined by " 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' [Citation.]" (*Lidster*, *supra*, 540 U.S. at p. __ [124 S.Ct. at p. 887].) This standard comports with existing constitutional law on the "reasonableness" requirement of searches and seizures and adds nothing to the question of whether requiring convicted felons to submit blood and saliva samples for a DNA database is reasonable or furthers a "special need."

"As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652.) "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*U.S. v. Knights* (2001) 534 U.S. 112, 118-119.) "Reasonableness . . . is measured in objective terms by examining the totality of the circumstances." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.)

We noted in *Adams*, *supra*, 115 Cal.App.4th at page 258, that "[d]eterrence and prevention of future criminality and accurate prosecution of past crimes are purposes

served by DNA testing and courts have upheld DNA acts for the law enforcement purpose of solving crimes. [Citations.] In addition, the Act[9] exempts all DNA and forensic identification profiles and other identification information from any law requiring disclosure of information to the public, and it makes the information confidential. (§ 299, subds. (a), (b).) The Department of Justice must comply with the provisions of the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.) which 'requires a public agency to limit the collection and retention of personal information to that necessary to accomplish the agency's specific purpose, and restricts disclosure of such information. (Civ. Code, §§ 1798.14, 1798.24; [citation].) These provisions are relevant in determining the extent of an intrusion upon privacy interests and in balancing the intrusion against the public interests to be served. [Citation.] (*Alfaro*, *supra*, 98 Cal.App.4th at p. 508, fn. 6.)"

Demanding a warrant and probable cause to believe that some other crime has occurred before requiring a convicted felon to submit blood and saliva samples adds no practical protection; rather it completely frustrates legitimate governmental objectives.

Furthermore, as the *Alfaro* court held, "[a] minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest." (*Alfaro*, *supra*, 98 Cal.App.4th at p. 506.)

In conclusion, we reaffirm this court's opinion in *Adams.* The requirement that defendant provide blood and saliva specimens for law enforcement identification analysis, pursuant to Penal Code section 296, serves compelling governmental interests in addition to a general interest in law enforcement.

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[9] The DNA and Forensic Identification Data Base and Data Bank Act of 1998 set out in Penal Code sections 295 et seq.

Moreover, Penal Code section 296 concerns a population that already has a diminished expectation of privacy. The necessary intrusion on defendant's privacy interests in obtaining the specimens is minimal. As a convicted felon he has no reasonable expectation of keeping his identity private from law enforcement and the statute provides that blood be withdrawn in a reasonable manner.

Accordingly, we reject appellant's challenge to Penal Code section 296.

Consecutive Sentencing

As noted, after imposing the mid-term of two years on count one, the trial court imposed a consecutive eight-month term on count five based on its finding that "there was a separate victim and a separate occasion." Appellant argues that since he did not admit these facts, nor were they found by the jury, the trial court's use of these facts to impose a consecutive sentence violated *Blakely v. Washington, supra,* __ U.S. __ [124 S.Ct. 2531].

In *Blakely*, the court held that the trial court violated the defendant's Sixth Amendment right to a jury trial when it sentenced the defendant to a 90-month "exceptional sentence," which was 37 months beyond the crime's standard range of 49 to 53 months. (*Blakely*, *supra*, 124 S. Ct at pp. 2535, 2537-2538.) The trial court imposed the exceptional sentence because it found the defendant acted with deliberate cruelty, a statutorily enumerated ground for imposing a sentence exceeding the standard range. (*Id*. at p. 2535.) The court reasoned that 53 months was the statutory maximum for *Apprendi*[10] purposes because it was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id*. at p. 2537.) Since the jury in *Blakely* did not find beyond a reasonable doubt the fact

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[10] In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.)

supporting the trial court's upward departure from the 53-month statutory maximum, the court concluded that the defendant was denied his right to a jury trial. (*Id*. at pp. 2537-2538.)

The California Supreme Court has agreed to consider the question of whether there is a right to a jury trial as to factors used to impose consecutive sentences in *People v. Black* (June 1, 2004, F042592) [nonpub. opn.], review granted July 28, 2004, S126182.

Assuming, without deciding, *Blakely* applies to factors used to impose consecutive sentences, here the factors used by the trial court to impose consecutive sentences were found by the jury. The guilty verdicts on the count one indecent exposure charge and the count five charge of annoying or molesting a child under 18 comprise a finding, beyond a reasonable doubt, that the convictions involved separate acts on separate occasions. The evidence showed that the count one indecent exposure charge related to events that occurred on October 12, 2002, and that 12 year-old Nia was the victim. Similarly, the evidence showed that the count five annoying or molesting charge related to events that took place on September 24, 2002, and that 9-year old Carly was the victim. The defense did not dispute the charged dates or the victims. When the trial court instructed the jury, it reiterated that the prosecution was alleging that count one occurred on or about October 12, 2002, and that count five occurred on or about September 24, 2002.

Appellant contends that there exists "no legitimate argument" that the jury necessarily found that the crimes for which it convicted him on counts one and five involved separate victims on separate occasions. Essentially, it seems that appellant argues that under *Blakely* we may not conclude the jury found beyond a reasonable doubt that counts one and five involved separate victims on separate occasions because the verdict forms themselves reflect no such findings. Appellant asserts, without citation to authority, that "[i]t would be inappropriate to look at additional matters seemingly apparent from the trial transcript that was not the subject of instructions and verdicts." We find nothing in *Blakely* that prevents us from so doing.

The evidence produced at trial and reflected in the jury's verdict on both counts supports the trial court's finding. Since the trial court relied on a fact found by the jury beyond a reasonable doubt, we find no violation of *Blakely* on the imposition of the consecutive sentence. Accordingly, we affirm the consecutive sentence on count five.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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MIHARA, J.